Supreme Court, U.S.
FILED
DEC 2 1994
OFFICE OF THE CLERK

No. 94-824

In The

Supreme Court of the United States

October Term, 1994

PETER A. CROSBY,

Petitioner,

v.

STATE OF HAWAII, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

RESPONDENTS' BRIEF IN OPPOSITION

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JURISDICTION

There is a substantial jurisdictional defect with respect to the instant Petition, in that the Petition was filed more than ninety days after issuance of the opinion of the Supreme Court of Hawaii, which constitutes the "judgment" for purposes of this Court's Rule 13.4. Petitioner's filing of the Petition within ninety days of the entry of the state court "Notice and Judgment on Appeal," Pet. App. C, is untimely, because that document is merely "the mandate (or its equivalent under local practice.)" S. Ct. R. 13.4. This defect, as well as the impact of the Eleventh Amendment, and the mootness of Plaintiff's claim for equitable relief, are discussed *infra* pp. 5-8.

STATEMENT OF THE CASE

The facts pertinent to this Petition are found in the trial court's findings of fact and conclusions of law. Pet. App. B. For purposes of this Court's preliminary review, the following are the most pertinent of the factual findings made below.

1. Hawaii law, at the times relevant to this proceeding, allowed public contracts to be let on a noncompetitive basis when the purposes thereof "do not admit of competition," or if the contract called for consultant services. Pet. App. A at 12-13 & n.4 (citing Haw. Rev. Stat. §§ 103-22, 103-32 (1985)). As a general matter, decisions whether particular contracts fell into one or both of these exceptions were unreviewable judicially and were committed to state agency discretion.

2. In 1988-89, Petitioner, then a resource allocation systems analyst in the Department of Budget and Finance of the State of Hawaii, not only voiced concerns that a particular contract for a "comprehensive management study of the state's tourism program" be competitively bid, but engaged in a systematic set of actions which had the effect of obstructing the orders of his superiors, backed by opinions by the Department of the Attorney General, that had concluded that the contract could be let noncompetitively. These actions consisted of failing to process an invitation to selected firms only (Pet. App. B at 10), preparing added memoranda during his working hours refuting his superiors' reasoning (*id.* at 11), writing further memoranda, at state expense, questioning the independent determination of the Department of Accounting and General Services, which performs functions analogous to the General Services Administration in

the federal government (*id.* at 14), expending additional state resources raising specious conflict-of-interest challenges to those who sought to contract with the State (*id.* at 17-18), defying the recommendations of the Department of the Attorney General designed to resolve any legal issue concerning whether discretion had been properly exercised (*id.* at 22-23), and otherwise taking action, at cost to the taxpayers, to frustrate his superiors' orders even though "his opinion on the legality of the non-bid approach to the tourist project was uninformed, without any expert basis and without any substantial personal experience of past practices" (*id.* at 27-28). Although the trial court did not expressly find that Petitioner was *informed* that "his actions were delaying the project," Petitioner was ultimately removed from "the project" because of "a general concern that things were not moving on the project and that the project was getting bogged down" (*id.* at 30). Petitioner, as the trial court found, was thus removed from the tourism contract project out of the Budget Director's "concern that the project move forward, and his sense that the Department would function more efficiently if he was able to unhook the particular project from the Plaintiff" (*id.* at 32). "Plaintiff was not fired, demoted or put on leave without pay," and "[n]o evidence was presented to show that Plaintiff suffered any actual damages" (*id.* at 34). In the end, the project was abandoned when the Department of Budget and Finance learned that another state agency had conducted a study similar to that which was the subject of the proposal. (Pet. App. A at 18).

3. Petitioner's claim that the reassignment of the tourism project violated his First Amendment rights was rejected in the state courts, after a full trial. The trial court

found that "there was no causal nexus between Crosby's expression of his First Amendment Rights and the reassignment of the tourism project at issue." Pet. App. B at 39. The Supreme Court of Hawaii affirmed, relying on the important distinction "between Crosby's expression and his conduct related to that expression." Pet. App. A at 37. Because, as the trial court found, "it was not the fact that Crosby expressed his disapproval of [Budget Director] Takushi's decision to employ a non-bid method of selection that prompted Takushi to remove Crosby from the project, but, rather, that Takushi's response was provoked by the delay and incompletion of the project and the 'bad blood' occasioned by Crosby's consistent refusal to accept Takushi's final decision *after* Crosby had surfaced his opinions," *id.* at 41, Crosby had no legal basis to challenge the trial court's judgment. In an alternative holding, the state court concluded that Crosby could still have been removed from the project "[e]ven were we to assume that Crosby's protected conduct was a motivating factor in the State's decision to remove *him*." *Id.* at 44. Given the minimal burden imposed on Crosby, and the State's paramount interest in efficient deployment of its scarce resources, the Petitioner had no valid right to relief under the Constitution.

REASONS FOR DENYING THE WRIT

1. This Court does not have jurisdiction over this case because the Petition was not timely filed. Supreme Court Rule 13.4 states that "[t]he time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent

under local practice)." Under Hawaii law, the "notice and judgment on appeal" serves no function *other* than as "a mandate," *see* Haw. R. App. P. 41(b), and its entry is simply a ministerial task assigned initially to the prevailing attorney (who prepares it) and then a single Justice, who approves it as to form. *See* Pet. App. C. This Court's jurisdiction to entertain a Petition for Certiorari is not impeded by the delay in the entry of the "notice and judgment on appeal," and for this reason the Court does not have jurisdiction to hear this Petition. The time in which to file the Petition in this case commenced on July 18, 1994, and expired on October 16, 1994, well before the Petition was filed.

2. The Court would not likely reach the issues raised by the Petition, even if they were otherwise worthy of review, because there is palpably no "case or controversy" with respect to any prayer for equitable relief, and Petitioner's claims for damages are all barred by *Will v. Michigan*, 491 U.S. 58 (1989), and by the doctrine of qualified officer's immunity. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In any event, Petitioner did not prove a single penny of damages, and he could not obtain an attorneys fee award based even on a prayer for nominal damages (which prayer he did not preserve). *See Farrar v. Hobby*, 113 S. Ct. 566 (1993). This case is thus unworthy of review.

3. The Supreme Court of Hawaii was unquestionably correct in rejecting Crosby's First Amendment challenge to the judgment.

a. The First Amendment plainly does not protect Crosby's Obstructive conduct, even if his speech was protected in *some* fashion by federal law. Crosby did far

more than simply voice his opinion. He expended not only substantial quantities of the state's resources, after implicit, and then express, orders to the contrary from his superiors, leading to the situation, at a minimum, where the Budget Director reasonably gained the impression that Crosby was responsible for blocking, delaying, and otherwise "bogging down" the award of the contract. Even if Crosby believed he was right – even if Crosby *was* right – that the contract ought not to have been let noncompetitively, he did not have authority to take the matter into his own hands. Had Crosby, on his own personal time, and supported by his own funds, written to the newspapers, given television interviews, or complained to the Legislature, this case might present more significant questions. But unless the state's ability to function is to be totally frustrated, Crosby's actions cannot amount to protected conduct. *See Waters v. Churchill*, 114 S. Ct. 1878, 1886-1889 (1994); *Connick v. Meyers*, 461 U.S. 138, 142 (1983); *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568 (1968).

b. Crosby's contention that the Supreme Court of Hawaii wrongly assigned the burden of proof to the State is meritless. A claim of wrongful retaliation under the First Amendment, as in cases of race discrimination under the Fourteenth Amendment, turns on federally questionable motive, at least at the threshhold. *Compare St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2749 (1993) (burden of persuasion always remains with the plaintiff), *with Waters*, 114 S. Ct. at 1888 (employee may be dismissed solely because of the employer's view "that a quieter subordinate would allow them to do this job more effectively"). In this case, Crosby had a full trial, and was not able to show, as a factual matter, that any

protected *speech* was the cause of his reassignment from the project to award the tourism contract.

c. The Supreme Court of Hawaii also found correctly that, in the alternative, Crosby could legitimately be removed from the project even if his "protected" speech was a partial motivation for the action. Although there is nothing in the record that warrants the Court even reaching this alternative conclusion, not a single decision of this Court either holds or suggests that a mere task reassignment constitutes a sufficient "burden" on First Amendment rights as to even warrant federal scrutiny of any kind. *Cf. Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 450-51 (1988) ("incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require government to bring forward a compelling justification.") Even if Budget Director Takushi was mistaken in his assessment of who was to blame for the project's delays, there is nothing in the record to indicate that the mistake was so "unreasonable" as to warrant deployment of this Court's scarce resources. Indeed, given the recency of this Court's *Waters* decision, Petitioner obviously cannot point to any conflict in the appellate courts that warrants this Court's corrective action or guidance at this time. The Hawaii Supreme Court, without prompting of the parties, took pains to analyze the record in light of *Waters v. Churchill, supra*, and there is no basis for further review or a summary remand here.

CONCLUSION

For the reasons above, the Petition should be denied.

Dated: Honolulu, Hawaii, December 2, 1994.

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